APPENDIX A

No. 16776 SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD SIMON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 15, 1969

Before CASTLE, *Chief Judge,* KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendant appeals his conviction, by the court without a jury, on three counts of the willful, forceful assault, resistance and interference with narcotics agents in performance of their official duties.[1] We affirm.

Before trial, Simon moved to quash the indictment on the ground, *inter alia,* that his arrest was "illegal, unlawful and unwarranted." The district court decided that the arrest was based on probable cause and that it was therefore unnecessary to decide whether the agents had time to obtain a warrant.

[1] 18 U.S.C. § 111.

The testimony in the light most favorable to the government is: On March 27, 1967, narcotics agents, without a warrant for his arrest, went to Simon's home in Chicago, at night, to arrest him. They observed him through a window, rang the front door bell, and when he came to the door announced to him they were agents. When Simon admitted his identity, the agents told him he was under arrest. He told the agents he was not "going anywhere" with them and struck agent Hughes. The agents followed him into his house and a struggle ensued during which Simon struck and kicked Hughes and agent Haight before they put handcuffs on him. Another struggle followed, with Simon kicking Hughes and Haight and biting agent Rendina. Finally, Simon again kicked an agent before they put him into the agents' car. Agent Haight signed a probable cause arrest complaint the next morning. Rule 5(a), FED. R. CRIM. P. The indictment followed.

The validity of the arrest before us is not determined by Illinois law since 26 U.S.C. § 7607 is determinative. *Cf. United States v. Di Re,* 332 U.S. 581, 589 (1948). The question then is whether Haight's affidavit, basis of the complaint, shows that the agents had reasonable grounds to believe Simon had committed a narcotics law violation, when they made the arrest. We agree that the probable cause issue must be determined upon the knowledge possessed by the agents at the time of arrest and not upon evidence developed at the trial, following the pretrial hearing on the motion to quash. The terms "reasonable grounds" in 26 U.S.C. § 7607, and "probable cause" in the Fourth Amendment, are substantial equivalents. *Elkanich v. United States,* 327 F.2d 417 (9th Cir.), *cert. denied,* 377 U.S. 917 (1964). See also *Wong Sun v. United States,* 371 U.S. 471, 478, n. 6 (1963); *United States v. Walker,* 246 F.2d 519, 526 (7th Cir. 1957).

Agent Haight's affidavit states that in the evening of March 27, 1967, he received a telephone call from Lieutenant Detective Davenport of the Madison, Wisconsin, police department; that Davenport reported, substantially, that he and Detective McFarland had on March 14 seized three pounds of marijuana in the apartment of one Friedman; that Friedman was not arrested and had on March 15, in the presence of his attorney, told the police that Simon had been his source of supply for three years; that on March 21, on information given Detective Kelly by Friedman in the presence of his attorney, Kelly and Friedman picked up a package at the post office addressed to Malcolm Jackson, Friedman's alias, which contained marijuana; that on March 21 Friedman told McFarland the package was sent pursuant to a previous call from Simon in California after Friedman agreed to use the alias and to pay $175.00 for the marijuana; and that on March 27 Friedman told Detective McFarland that Simon had called him from Chicago to check on the arrival of the package and that Simon said he knew something was wrong in Madison and was going to Europe immediately.

Haight's affidavit went on to state that McFarland had given him a description of Simon, his and his father's address and telephone number—all of which had been furnished by Friedman; that Simon was subject of a Madison marijuana investigation in May and July of 1966; that Haight's check of Narcotics Bureau files disclosed Simon's arrest for possession of marijuana in April, 1966; that Haight found Simon's father's name, address and telephone number coincided with the information given by McFarland; and that the person who answered the door at the address, the night of arrest, filled the description Haight had been given and admitted that he was Donald Simon.

We hold that the warrantless arrest was valid because we think the agents could have "reasonably" believed that Simon had committed a narcotics offense and might escape arrest if time was taken to obtain a warrant the next day. The facts and information known to the agents, or learned "from others" before the arrest were "such as to warrant a man of prudence and caution" in believing that Simon had committed the narcotics offense for which he was arrested. *Carroll v. United States*, 267 U.S. 132, 161 (1925). What Lieutenant Detective Davenport knew directly and told Haight was hearsay and what Davenport told Haight Detectives McFarland and Kelly told him was more remote hearsay. But hearsay proximate or remote does not of itself vitiate an arrest with or without a warrant, as long as there is a substantial basis for crediting the hearsay. *Jones v. United States*, 362 U.S. 257, 269 (1960). We think Haight had a substantial basis for believing what Davenport told him, and that Davenport, knowing what he knew directly, had a substantial basis for believing what Detectives Kelly and McFarland told him. See *United States v. McCormick*, 309 F.2d 367, 372 (7th Cir. 1962); *Rogers v. United States*, 267 F.2d 79 (9th Cir. 1959).

We brush aside as frivolous any suggestion that Lieutenant Detective McFarland may not exist as far as Haight knew. What Kelly and McFarland learned from Friedman was from a reliable source. The freedom and cooperation of Friedman, the post office pickup of the marijuana, and the presence of Friedman's lawyer at the various conferences indicate the reliability of the source. This court in sustaining a search warrant noted that in its "functioning" the FBI must reasonably be assured the need of agents in one locality relying upon information given by agents in another. *United States v. Mc-*

Cormick, 309 F.2d 367, 372 (7th Cir, 1962). We see no less a need between state and federal law enforcement officers. This need is evident from the Haight affidavit, namely, a sale agreed to, and confirmed, respectively, in telephone calls from California and Chicago, Illinois, to Madison, Wisconsin, and investigations by Madison police officers with respect to a matter of federal concern. Impediments to cooperative communication and to interdependence between local and federal law enforcement officials should not be encouraged by narrow application of rules of law at the cost of effective lawful cooperation. The confirmation of Simon's address and telephone number, the description, coinciding with Simon's admitted identity at the door, enhanced the reliability of the information given Haight by Davenport and McFarland. The bare affidavit in *Aquilar v. Texas,* 378 U.S. 108 (1964), distinguishes that case from the one before us, and the rule in *Aquilar,* at 114, which Simon relies on, is met here by the circumstances which we think render the hearsay sufficiently reliable. The Commissioner, upon the basis of Haight's affidavit, presumably thought the affidavit sufficient to sustain the arrest, and the district court before trial decided there was probable cause. We think the recent Supreme Court decision in *Spinelli v. United States,* ..... U.S. ..... (Slip Op. No. 8, Jan. 27, 1969), further explicating the standards of *Aquilar,* is distinguishable upon its facts from the case now before us and does not preclude our conclusion that there was probable cause for Simon's arrest.

The case of *John Bad Elk,* 177 U.S. 529 (1900), principally relied on to justify Simon's forceful resistance of the arrest, is inapplicable because of our holding. The same is true of other cases relied on by Simon. Because

the arrest of Simon was lawful, he had no right to resist the arrest with force. *Cf. United States v. Heliczer,* 373 F.2d 241 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967), and authorities cited therein.

As an additional ground for sustaining Simon's conviction, the government argues that even if the arrest was unlawful, Simon had no right to resist the arrest as he did. We think this argument has merit, and that the consequences of accepting defendant's argument to the contrary would lead to great mischief with respect to encouraging resistance to, and to endangering, arresting officers. We recognize that law enforcement officers are frequently called on to make arrests without warrants and should not be held, so far as their personal security is concerned, to a nicety of distinctions between probable cause and lack of probable cause in differing situations of warrantless arrests. It is for this reason we believe that the force of *John Bad Elk* has been diminished. See *United States v. Heliczer,* 373 F.2d 241, 246, n. 3 (2d Cir. 1967). In the case before us the FBI officers, at the door of Simon's home, identified themselves so that Simon was aware who they were. And the agents did not lose this official capacity, even if the arrest were subsequently adjudged to be unlawful. *Id.* at 245.

We conclude that the evidence taken most favorably to the government supports Simon's conviction.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, April 15, 1969

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 16766
CHARLES W. POSEY,
Plaintiff-Appellant,
vs.
CLARK EQUIPMENT COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Wednesday, May 14, 1969

Before

Hon. LATHAM CASTLE, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*

No. 16776 UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. DONALD SIMON, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered that the petition for a rehearing of this cause be, and the same is hereby, Denied.

It Is Further Ordered that the opinion be modified by substituting for the last sentence-paragraph on page 5 of the slip opinion the following sentence:

> The agents testified at the trial that they informed Simon that they were narcotics agents, and we conclude that the evidence taken most favorably for the government supports Simon's conviction.

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 233

In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 409 F. 2d 474.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1969 (Pet. App. B). A timely petition for rehearing was denied on May 14, 1969 (Pet. App. C). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly held that there was probable cause for petitioner's arrest.

2. Whether, in the circumstances of this case, petitioner's convictions under 18 U.S.C. 111 for forcibly resisting arrest and assaulting federal narcotics agents could be sustained in the absence of probable cause for the arrest.

STATEMENT

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of forceable assault, resistance, and interference with narcotics agents engaged in the performance of their official duties, in violation of 18 U.S.C. 111 (Pet. App. A). He was sentenced to five years' probation, the first sixty days of which were to be served in custody (Record on Appeal 47). The court of appeals affirmed (Pet. App. A).

On the evening of March 27, 1967, narcotics agent Haight received a telephone call from Detective Lieutenant Davenport of the Madison, Wisconsin, Police Department, who told him that an informant of that department, Jim Friedman, had given information concerning marijuana transactions with petitioner (Tr. 20).

The Madison police had arrested Friedman in possession of marijuana, and he had named petitioner as his supplier. Several days later Friedman took the Madison police to the Post Office to pick up a package containing marijuana which he said petitioner had sent to him from California in accordance with an agreement between them. On March 27, 1967, Friedman called the Madison police to tell them that peti-

tioner had telephoned him to inquire about the California package and that petitioner had said he knew something was wrong and was about to leave the country. Friedman also gave the Madison police a description of petitioner, his Chicago address, and the name and telephone number of petitioner's father in Chicago.

After receiving this information, agent Haight then checked the Chicago telephone directory, which confirmed some of the information given by Friedman, and he also learned that petitioner had been arrested by the Chicago police for possession of marijuana. He then contacted an Assistant United States Attorney, who agreed that petitioner should be arrested (Tr. 21).

Agent Haight and two other narcotics agents, Rendina and Hughes, went to petitioner's home to arrest him (Tr. 5–6, 19, 66). Through a window, they saw a man who fitted the description given by Friedman and rang the bell (Tr. 6, 86). Petitioner answered the door, and the agents identified themselves as federal narcotic agents (Tr. 6, 87). When petitioner admitted his identity, they told him that he was under arrest for violation of the federal marijuana laws. Petitioner said that he was not "going anywhere" with them and punched agent Hughes. (Tr. 9–13, 87–88.) Petitioner was subdued after a struggle during which he punched and kicked all the agents and bit agent Rendina (Tr. 9–18, 68–70, 88–91). The next day, pursuant to Rule 5(a), F.R. Crim. P., agent Haight filed an arrest affidavit setting forth the grounds for the arrest as de-

scribed above, and the Commissioner issued a complaint (Supplement to Record on Appeal).

Prior to trial petitioner moved to quash the indictment on the ground that there was no probable cause for the arrest. The district court denied the motion, finding that probable cause was shown by the information contained in the affidavit. The court of appeals affirmed the convictions, holding that the arrest was lawful, as based on probable cause, and that petitioner therefore had no right to resist with force. The court of appeals also found "merit" in the government's alternative argument that even if probable cause for the arrest were lacking, petitioner had no right to assault the agents.

ARGUMENT

1. The petition for a writ of certiorari is based primarily on the court of appeals' approval of the government's alternative position that the convictions should be affirmed even in the absence of probable cause for the arrest. That issue is not squarely presented, however, since the court correctly held that the agents did have probable cause to arrest without a warrant. The information known to Agent Haight at the time of the arrest met the standards for probable cause established by this Court in *Spinelli* v. *United States,* 393 U.S. 410. Friedman's information came from his personal dealings and communications with petitioner, and his reliability was shown in his dealings with the Madison police; the trustworthiness of the information also derived some support from the agents' own inquiries. Cf. *Draper* v. *United States,* 358

U.S. 307. In view of the informant's warning that petitioner suspected trouble and said he was going to abscond, the arrest without a warrant was clearly lawful. 26 U.S.C. 7607; *United States* v. *Jamison*, 395 F. 2d 716 (C.A. 2), certiorari denied, June 23, 1969, No. 550 Misc., O.T., 1968.

Petitioner contends that probable cause was not properly established at trial because the detailed information set forth in Haight's post-arrest affidavit was not repeated on the witness stand. It was specifically stated at trial, however, that the affidavit accurately reflected the agents' information at the time of the arrest (Tr. 98–99). And defense counsel objected when the prosecutor attempted to go into the basis for probable cause at trial and when he attempted to introduce the affidavit in evidence (Tr. 20–21, 114). In these circumstances, petitioner is in no position to complain because Haight's testimony at trial was not as detailed as his affidavit. Probable cause is a matter of law to be decided by the court, and where the trial court is also the trier of fact, as in this case, the courts could properly consider information which is on record at prior stages of the proceedings. Cf. *Gatewood* v. *United States*, 209 F. 2d 789 (C.A.D.C.).

2. If it were necessary to reach the question, the government's alternative position approved by the court of appeals is correct. In the circumstances of this case, where the agents fully identified their authority and purpose and proceeded in good faith on information which they believed constituted probable cause to arrest, they were acting "in * * * the

performance" of their duties and were entitled to the personal protection contemplated by the criminal statute, even if a court should later disagree with their judgment as to whether probable cause existed. If petitioner wanted to test the legality of his arrest, he had other, peaceful methods available, short of physical violence. See *United States* v. *Heliczer,* 373 F. 2d 241, 245–246 (C.A. 2), certiorari denied, 388 U.S. 917; *Hodgdon* v. *United States,* 365 F. 2d 679 (C.A. 8), certiorari denied, 385 U.S. 1029; *Amaya* v. *United States,* 247 F. 2d 947, 950–951 (C.A. 9), certiorari denied, 355 U.S. 916; *Palmquist* v. *United States,* 149 F. 2d 352 (C.A. 5), certiorari denied, 326 U.S. 727; *Arwood* v. *United States,* 134 F. 2d 1007, 1010 (C.A. 6), certiorari denied, 319 U.S. 776.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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WILL WILSON,
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BEATRICE ROSENBERG,
ELIZABETH MEYER,
Attorneys.

JULY 1969.